FILED BY CLERK
MAR -3 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARVIN O. RAMBEL, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, MNI ENTERPRISES, Respondent Employer, AMERICAN HOME ASSURANCE, Respondent Insurer.	2 CA-IC 2010-0011 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20062190196

Insurer No. 710277113

Honorable LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

Marvin O. Rambel
Tucson
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

Klein, Lundmark, Barberich & La Mont, P.C.
By Kirk A. Barberich and Eric Slavin — Phoenix
Attorneys for Respondents
Employer and Insurer

E C K E R S T R O M, Judge.

¶1 In this statutory special action, petitioner employee Marvin Rambel challenges the Industrial Commission's award denying his petition to reopen his claim for benefits. He argues the administrative law judge (ALJ) erred by adopting the medical opinion of a physician who performed an incomplete medical examination. Rambel also alleges he observed the ALJ having an improper ex parte communication with the same physician. For the following reasons, we affirm the award.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the award. *Tsosie v. Indus. Comm'n*, 183 Ariz. 539, 540, 905 P.2d 548, 549 (App. 1995). Rambel injured his right hand in a workplace accident in July 2006. After the insurer accepted his claim for benefits, he received carpal tunnel release surgery, post-surgery physical therapy, and medications. The insurer closed his claim in November 2007. Rambel protested the closure of his claim and the denial of a petition he had filed in April 2008 to reopen the claim. After a hearing, the ALJ concluded Rambel's injury was "stable and stationary as of November 1, 2007" and "the claim [wa]s closed with no permanent

impairment" as of that date. The ALJ also concluded Rambel had not shown he was entitled to reopen his claim based on medical care he had received after the claim was closed, including surgery to relieve pain in his right elbow and forearm.

¶3 Rambel again filed a petition to reopen his claim in November 2009, alleging he needed further testing or treatment for his right arm related to the 2006 injury. The insurer declined to reopen the claim and Rambel requested a hearing to contest that denial. At the hearing, Dr. John Hayden testified that, apart from the surgery Rambel had received in 2008, which was not work related, there had been no change in Rambel's condition since his claim had been closed in November 2007. Dr. Mitchel Lipton, Rambel's treating physician, testified the atrophy of Rambel's arm was related to the industrial injury and is a permanent impairment, but he conceded there had been no major change in Rambel's condition since 2007.[1] The ALJ upheld the denial of the petition to reopen, finding that Rambel had not shown he was suffering from a new condition related to his industrial injury. After the decision was affirmed upon administrative review, Rambel filed this statutory special action.

Discussion

¶4 Section 23-1061(H), A.R.S., provides that an employee may petition to reopen a claim that had previously been accepted for benefits "upon the basis of a new, additional or previously undiscovered temporary or permanent condition." An employee

[1]Lipton also testified Rambel suffers from palmar fibromatosis as a result of the industrial injury, but that issue had been previously decided against Rambel and cannot be litigated again. *See Perry v. Indus. Comm'n*, 154 Ariz. 226, 228, 741 P.2d 693, 695 (App. 1987) (need for finality precludes relitigation of issues already determined when claim closed).

has the burden of establishing the new condition and its causal relationship to the prior industrial injury. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 16, 19, 695 P.2d 261, 265, 268 (1985). When reviewing the denial of a petition to reopen a claim, we defer to the ALJ's findings of fact but independently review the ALJ's legal conclusions. *See Young v. Indus. Comm'n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003). We will affirm the Industrial Commission's decision so long as it is supported by substantial evidence. *Price v. Indus. Comm'n*, 23 Ariz. App. 1, 4, 529 P.2d 1210, 1213 (1975).

¶5 Rambel argues the ALJ erred in adopting Hayden's opinion over Lipton's because Hayden failed to perform a complete examination. The ALJ adopted Hayden's opinion that Rambel had no new condition related to the industrial injury as "most probably correct and consistent with prior findings." Hayden conceded that he had not been able to fully examine Rambel in the most recent examination performed in March 2010 because Rambel refused to cooperate. But he also based his opinion on Rambel's medical records, including the results of a recent electromyogram (EMG), and an examination he had performed on Rambel in 2007.

¶6 Nonetheless, even assuming Hayden's opinion was based on an inadequate foundation, Lipton also testified that there had been no material change in Rambel's condition since 2007. Thus, even had the ALJ adopted Lipton's opinion, his testimony would not have been sufficient to establish the requirements for reopening the claim. *See Crocker v. Indus. Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980) (recognizing requirement of comparative medical evidence of change in claimant's condition to

warrant reopening, absent previously undiscovered condition); *Perry v. Indus. Comm'n*, 154 Ariz. 226, 229, 741 P.2d 693, 696 (App. 1987) (comparative medical evidence necessary to "establish that an industrially related condition developed or worsened after the claim was closed"); *see, e.g.*, *Maricopa County v. Indus. Comm'n*, 134 Ariz. 159, 163, 654 P.2d 307, 311 (App. 1982) (claimant's failure to provide comparative evidence establishing change in medical condition precluded reopening of claim).

¶7 Rambel also contends the award should be set aside because he observed the ALJ talking to Dr. Hayden outside of the hearing room after the hearing ended, which, he alleges, was an improper ex parte communication under Arizona Administrative Code R2-19-105. We note that Rambel did not raise this issue in his request for review of the ALJ's decision, and we could decline to consider it on this basis alone. *See Stephens v. Indus. Comm'n*, 114 Ariz. 92, 95, 559 P.2d 212, 215 (App. 1977). But, in any event, the Arizona Administrative Code provides that "[a] party shall not communicate, either directly or indirectly, with the administrative law judge about any substantive issue in a pending matter," subject to a few exceptions not applicable here. Ariz. Admin. Code R2-19-105. First, Hayden was not a party in the matter but was a witness. Second, Rambel has provided no evidence the communication involved a "substantive issue" in the pending matter. Accordingly, Rambel has not sustained his burden to show there was an improper communication.

Disposition

¶8 Award affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge